

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Roger A. Haley,

Civil No. 07-4011 (RHK/AJB)

Plaintiff,

ORDER

vs.

C.B. Fleet Company, Inc., a Virginia
corporation,

Defendant.

This matter is before the Court on Defendant C.B. Fleet Company, Inc.'s Motion for Summary Judgment (Doc. No. 51). For the reasons set forth below, the Court will grant the Motion.

This is a negligence action concerning C.B. Fleet's Phospho-soda, an ingestible liquid that C.B. Fleet marketed for use as a laxative and a "purgative" for people preparing for bowel surgery or endoscopic examination (colonoscopy). According to the Complaint, Plaintiff, a healthy 55-year-old male, ingested Phospho-soda on October 19, 2006, in preparation for a colonoscopy. Plaintiff alleges that shortly after doing so, he suffered "phosphate toxicity," resulting in renal (kidney) failure.

Plaintiff commenced this action on September 18, 2007; at the time, he was represented by the law firm of Foley & Mansfield. Plaintiff alleges that C.B. Fleet knew that Phospho-soda posed a risk of kidney problems but failed to so inform the consuming public. In particular, he alleges that C.B. Fleet failed to include required warnings on

Phospho-soda's product label. He alleges eight claims against C.B. Fleet: negligence; strict liability – design defect; strict liability – failure to warn; breach of express warranty; breach of implied warranty; fraud; fraudulent concealment; and consumer fraud in violation of Minnesota Statutes § 325F.69.

On September 4, 2008, Foley & Mansfield sought leave to withdraw as Plaintiff's counsel, citing a breakdown in communications with Plaintiff. Magistrate Judge Boylan granted that Motion, and Foley & Mansfield informed Plaintiff that he was thereafter proceeding *pro se*.

On February 2, 2009, C.B. Fleet served Requests for Admission (the "Requests") on Plaintiff. In the Requests, C.B. Fleet asked Plaintiff to admit that (1) his ingestion of Phospho-soda did not cause his kidney problems; (2) he has not been diagnosed with acute phosphate nephropathy; and (3) he has not been diagnosed with nephrocalcinosis.¹ Plaintiff did not respond to the Requests.

C.B. Fleet now moves for summary judgment. It argues that, as a result of Plaintiff's failure to respond to the Requests, he has admitted that his injuries were not caused by his ingestion of Phospho-soda and, hence, he cannot prove the necessary causation. Plaintiff has not responded to the Motion.

C.B. Fleet's argument is correct. Under Federal Rule of Civil Procedure 36, the failure to respond to a request for admission within 30 days of being served results in the

¹ Acute phosphate nephropathy and nephrocalcinosis both concern the deposit and build-up of calcium in the kidneys, which may result in permanent impairment of kidney function and, ultimately, renal failure.

matter being conclusively established. Fed. R. Civ. P. 36(a)(3), (b). Hence, Plaintiff has admitted that Phospho-soda did not cause his injuries. In the absence of causation, Plaintiff's claims, including his consumer-fraud claim under Minnesota Statutes § 325F.69, must fail. See, e.g., Worden v. Gangelhoff, 241 N.W.2d 650, 651 (Minn. 1976) (regardless whether characterized as negligence, strict liability, or warranty claim, plaintiff seeking to recover for injuries from defective product must prove causation); Yarrington v. Solvay Pharms., Inc., No. A05-2288, 2006 WL 2729463, at *5 (Minn. Ct. App. Sept. 26, 2006) (claim under Section 325F.69 requires proof of causation); Trenholme v. QRS Diagnostic, LLC, No. A05-2472, 2006 WL 2601664, at *3 (Minn. Ct. App. Sept. 12, 2006) (common-law fraud requires evidence of causation).

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED** that C.B. Fleet's Motion for Summary Judgment (Doc. No. 51) is **GRANTED** and this action is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: June 10, 2009

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge